

HUMAN SERVICES BOARD

INTRODUCTION

ORDER

The Department's decision denying coverage under § M108 is affirmed. The matter is remanded to the hearing officer for further consideration of the Department's other legal arguments.

DISCUSSION

The petitioner is a fifteen-year-old Medicaid recipient who suffers from Perlizaeus-Merzbacher Disease, a rare form of Leukodystrophy. It is a disorder of the central nervous system affecting motor control. The petitioner cannot independently sit up, stand, or control his arms and legs.

Until January 2005 the petitioner rode in the family van in a specialized car seat. However, he has outgrown the car seat and now must be transported in his specially designed power wheelchair that can be transferred to a van. Due to his size and their own physical infirmities, his parents are not able to safely transfer him out of his wheelchair and into a van or other vehicle. His parents' van can transport the petitioner in his wheelchair, but it is not equipped with a lift that can get the petitioner into the van while sitting in his chair.

Since January 2005 the petitioner's parents have been using the services of a local Medicaid transportation provider that uses a lift-equipped van to transport the petitioner to his various medical appointments and therapy sessions. The parents allege that from January through May 2005 Medicaid had spent \$2,833 for these transportation costs. They also allege

that the cost of the lift conversion they are seeking for their van would cost \$5,682 plus taxes.

The parents also allege that they have experienced several problems with the Medicaid transportation provider. Out of twenty-two times they have attempted to use the service, twice the van has not shown up. Five times it has been from ten to twenty minutes late. Once a driver was verbally abusive, and once a driver drove too fast. Except for the surly driver, the petitioner does not allege that he brought any of these problems to the Department's attention, except in the context of enumerating them for this appeal.

Although the parents allege (credibly) that sitting for extended periods without repositioning is painful for the petitioner, they have not submitted any medical evidence that continued use of the Medicaid van service, even if the problems described above continue to happen, places the petitioner at any significant medical risk. There appears to be no question that the petitioner and his family are inconvenienced by these problems, but there has been no showing that such problems are either intractable,¹ endemic to

¹ For example, the Department, not unreasonably, suggests that the parents allow more leeway in the scheduling of the petitioner's rides in anticipation that the van may be late.

the system, or cannot be ameliorated through existing complaint and investigation procedures.

The Department concedes that the petitioner is entitled to medically necessary transportation services under both general program provisions and EPSDT provisions applying to children.² There is no question that wheelchair lift conversions for family-owned vans are not specifically covered under Medicaid either as "durable medical equipment" (W.A.M. § M840.3) or as a specific item under "transportation services" (§ M755). The petitioner has asked for an evaluation of his needs and circumstances pursuant to M108, a regulation adopted on April 1, 1999 which allows the Department to review individual situations pursuant to a set of criteria. M108 is reproduced in its entirety as follows:

² See 42 C.F.R. §§ 431.53 & 441.62.

The Board has held that M108 gives the Commissioner of DCF the authority to make exceptions for Medicaid coverage in cases which he or she deems meet certain criteria, and that the Board may only overturn an M108 decision if it is shown to be arbitrary, unreasonable, or otherwise an abuse of discretion. (See e.g., Fair Hearing No. 19,220.)

In this case the petitioner has offered convincing anecdotal evidence that a mechanical lift installed in the family van would enable his family to transport him more comfortably, efficiently, conveniently, and probably at lower cost than continuing to rely on contracted Medicaid transportation providers in his area. There is no question, however, that the petitioner has not shown that continued reliance on existing Medicaid transportation services will result in "serious detrimental health consequences", as required under M108. Nothing in that regulation requires the Department to provide any service solely on the basis of cost. The criteria are clearly discretionary, and in this case the Department has set forth sufficient rationales for denying coverage (e.g., supervision and monitoring of use, uncertainty of repair and maintenance costs, insurance problems, etc).

As has been the case in several previous fair hearings on this issue, it may well be that the coverage sought under M108

would be superior to and cheaper than the service the Department is willing to cover. Under the circumstances, it is not unreasonable that the petitioner's doctors and other treatment providers would support his request for a wheelchair lift. However, as the Board has noted, even though it might reach a different conclusion under the evidence, the discretionary decision of the Commissioner, if validly exercised, must be upheld.

In this case, the Department has made clear that it stands willing to provide transportation services to the petitioner that are medically necessary. If and when the petitioner can show that using existing transportation services will result in serious detrimental health consequences he is free to reapply for M108 coverage of alternative services, including a wheelchair lift for his family's van. Until that time, however, in light of the foregoing the Department's decision in this matter must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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